

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Jason Stone, Jason for Parks Committee,
Complainant,

vs.

Supporters of Carol Kummer for Park
Board Commission,

Respondent.

FINDINGS OF FACT,
CONCLUSIONS, AND
ORDER

The above-entitled matter came on for an evidentiary hearing on October 10, 2005, before a panel of three Administrative Law Judges: Barbara L. Neilson (Presiding Judge), Richard C. Luis, and Bruce H. Johnson. The hearing record closed on October 10, 2005, at the close of the hearing.

Eneasalo V. Ale, Faegre & Benson, LLP, 2200 Wells Fargo Center, 90 South Seventh Street, Minneapolis, MN 55402-3901, appeared on behalf of Carol Kummer and the Supporters for Carol Kummer for Park Board Commission ("Respondent").

Jason Stone, 1708 57th Street East, Minneapolis, MN 55417, appeared on his own behalf and on behalf of Jason for Parks Committee ("Complainant").

NOTICE

This is the final decision in this case, as provided in Minn. Stat. § 211B.36, subd. 5. A party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

STATEMENT OF ISSUES

By using the initials "DFL" on campaign material, did the Respondent violate Minn. Stat. § 211B.02 by falsely implying that Carol Kummer had the endorsement of the DFL party?

The panel concludes that the Respondent violated Minn. Stat. § 211B.02 by knowingly using the initials DFL on campaign material, which falsely implied that Carol Kummer had the endorsement or support of the DFL party. A fine in the amount of \$600 is imposed.

Based upon the entire record, the panel makes the following:

FINDINGS OF FACT

1. The Minneapolis Park and Recreation Board is made up of six district commissioners and three at-large commissioners. All nine commissioners are elected by the voters of Minneapolis during the General Election every four years.¹

2. Carol Kummer is currently the Minneapolis Park and Recreation Board Commissioner for District 5. She was appointed to this position approximately two years ago, following the death of the elected Commissioner for District 5.²

3. Jason Stone and Carol Kummer are the only candidates in the November 8, 2005, election for the Minneapolis Park and Recreation Board's District 5 seat. Both are affiliated with the Democratic-Farmer-Laborer ("DFL") party, but neither won the party's endorsement.³ However, both Mr. Stone and Ms. Kummer will be identified as "DFL" on the November ballot.⁴

4. Minneapolis Park and Recreation Board District 5 is located in the south-eastern section of the City. It is roughly bounded by the Crosstown Highway, 35W, the Mississippi River, and 35th Street. There are approximately 37,000 registered voters in District 5.⁵

5. Ms. Kummer has been an active member of the DFL party and has in the past worked on several other candidates' campaigns. When she filed for the position of Park Board Commissioner, she was given a packet of information, which included Minnesota Statutes Chapter 211B. Ms. Kummer read Chapter 211B and paid particular attention to §§ 211B.02, 211B.03, and 211B.04 before designing her campaign material.⁶

6. On July 29, 2005, Ms. Kummer picked up from the printer 20,000 campaign flyers that she designed for her campaign. The flyers are approximately 6.5" x 11." At the bottom of the flyer is the following language printed in the approximate font size shown:

¹ Testimony of Stone and Bonham.

² Testimony of Bonham.

³ Sixty percent of the vote was needed to win the DFL party's endorsement. Mr. Stone and Ms. Kummer each received about 50 percent of the vote, with Mr. Stone receiving slightly less than Ms. Kummer.

⁴ Testimony of Kummer and Stone.

⁵ Testimony of Stone and Bonham.

⁶ Testimony of Kummer; September 20, 2005, Memo to Administrative Law Judge Kathleen Sheehy from Kummer.

“Labor Endorsed for Park District 5

CAROL

Kummer

DFL ”⁷

The phrase “Labor Endorsed for Park District 5” appears to be in approximately 18-point font. The word “Kummer” is in approximately 72-point font. The initials DFL are in approximately 18-point italicized font. In between the word “Kummer” and “DFL” is a picture of an oak leaf.

7. Within a day or two of picking up her campaign flyers from the printer, Ms. Kummer began door-knocking and distributing the flyers.⁸

8. Ms. Kummer also designed and ordered 300 lawn signs. The lawn signs contain her name in the center of the sign with the phrase “Park District 5” in the upper right corner and “DFL” in the upper left corner. The phrase “LABOR ENDORSED” appears underneath her name.⁹ Ms. Kummer ordered 50 large lawn signs (2’ x 4’) and 250 standard lawn signs (18” x 24”). She picked up her lawn signs from the printer on August 19, 2005, and began installing them within a few days.¹⁰

9. Ms. Kummer describes herself as a life-long Democrat. In designing the campaign flyer and lawn signs, Ms. Kummer wanted to let voters know that she is a “proud member” of the DFL party. However, she intentionally put the initials “DFL” in italics and separated them from the phrase “Labor Endorsed” in an attempt to avoid the implication that she was the DFL-endorsed candidate.¹¹

10. On or about August 8, 2005, Ms. Kummer distributed her campaign flyers at a voter registration event held at Hiawatha Park.¹²

11. Minneapolis is considered to be a largely DFL city - that is, voters in Minneapolis tend to elect DFL-endorsed candidates over other candidates. Therefore, the DFL endorsement is considered to be an important tool in winning elections.¹³

12. On August 14, 2005, Tim Bonham, Treasurer of the Minneapolis DFL, posted a response on an on-line political discussion forum known as the

⁷ Ex. 8.

⁸ Testimony of Kummer.

⁹ Ex. 9.

¹⁰ Testimony of Kummer.

¹¹ Testimony of Kummer.

¹² Testimony of Bonham.

¹³ Testimony of Blixt, Bush, Bonham and Stone.

“Minneapolis Issues List.” The Minneapolis Issues List has approximately 1,000 subscribers.¹⁴ Mr. Bonham was responding to a discussion thread that originated with a question involving another non-endorsed candidate’s use of “Green Party” on his campaign material. In his posting, Mr. Bonham opined that such activity would falsely imply party endorsement and would be a violation of Minnesota Statute 211B.02. Mr. Bonham advised that non-endorsed DFL candidates may put “DFL member” or “DFL’er” on their campaign materials, but said that the DFL would file charges if candidates used just the initials “DFL” or implied “DFL Supported.”¹⁵

13. On August 19, 2005, Mr. Stone posted a response on the “Minneapolis Issues List” noting that the Kummer campaign material included the initials “DFL” by her name, incorrectly implying that she is the DFL endorsed candidate. Mr. Stone stated that he hoped the Kummer campaign was not going to distribute this campaign material as part of a coordinated campaign literature “drop” planned for the next day.¹⁶

14. On August 19, 2005, Jim Bush, Kummer’s campaign co-chair, responded to Mr. Stone’s posting. Mr. Bush stated that, although there was no party endorsement for the District 5 Park Board race, Ms. Kummer, as a proud life-long member of the DFL Party, was within her “legal means” to display the initials DFL on her campaign material.¹⁷

15. On August 19, 2005, Mike Skoglund, another subscriber to the Minneapolis Issues List, emailed Mr. Bush regarding his posting and copied the email to the Minneapolis Issues List. Mr. Skoglund advised Mr. Bush to check his position with an attorney and appended a portion of the Minnesota Supreme Court decision in *Schmitt v. McLaughlin*,¹⁸ which held that a non-endorsed candidate’s use of the initials “DFL” would falsely imply to the average voter that the candidate had the endorsement or support of the DFL party in violation of Minnesota election law.¹⁹

16. On August 19, 2005, Mr. Stone emailed Ms. Kummer and Mr. Bush advising them to contact Mr. Bonham for clarification on the authorized use of the DFL party name on campaign material. Mr. Stone copied the email to Mr. Bonham.²⁰

17. Prior to August 20, 2005, Ms. Kummer and her campaign co-chairs, Mr. Bush and Pamela Blixt, were aware of the on-line discussions and of Mr.

¹⁴ Testimony of Stone.

¹⁵ Ex. 1; Testimony of Bonham, Stone.

¹⁶ Ex. 2; Testimony of Stone.

¹⁷ Ex. 3; Testimony of Bush and Stone.

¹⁸ 275 N.W.2d 587 (Minn. 1979).

¹⁹ Ex. 4.

²⁰ Ex. 5; Testimony of Stone.

Stone's concerns regarding Ms. Kummer's use of the initials "DFL" on her campaign literature.²¹

18. On August 20, 2005, Ms. Kummer and her campaign volunteers distributed her campaign flyers to approximately 3,000 households. By the end of the month, Ms. Kummer and her campaign staff had distributed about 4,000 to 6,000 flyers.²²

19. On August 20, 2005, or shortly thereafter, Ms. Kummer called Tim Bonham and asked him whether the DFL would file a complaint against her for using the initials "DFL" on her campaign material. Mr. Bonham responded that it would be up to the DFL Executive Committee to decide whether to file a complaint. He noted that there were other candidates besides Ms. Kummer who were using the initials "DFL" without being endorsed. He said that his position was that non-endorsed candidates should not use the initials "DFL." However, Mr. Bonham stated that because there was no endorsed candidate in the race, he believed the Executive Committee would not get involved.²³

20. Ms. Kummer did not consult with a legal expert after Mr. Stone raised concerns regarding her use of "DFL."²⁴

21. Within a couple of days of August 20, 2005, the Kummer campaign committee had placed more than 150 lawn signs in the District 5 area.²⁵

22. On September 1, 2005, Mr. Stone emailed Ms. Kummer and advised her that her campaign's use of the initials "DFL" on campaign material was illegal. Mr. Stone asked Ms. Kummer to tell him what corrective action she planned on taking and informed her that if he did not hear back from her or was not satisfied with her response, he would file a complaint.²⁶

23. At a candidates' forum held on September 7, 2005, Mr. Stone again asked Ms. Kummer to correct her campaign literature and lawn signs. Ms. Kummer told Mr. Stone that she would take corrective action only if she was told to do so by someone in authority, like the Minneapolis DFL Executive Committee.²⁷

24. On September 8, 2005, the Minneapolis DFL Executive Committee met to discuss a question it had received from Jason Stone's campaign committee regarding Ms. Kummer's use of the initials "DFL" on her campaign material. The Executive Committee discussed bringing a complaint against Ms. Kummer but instead decided to send a letter to all DFL candidates clarifying what

²¹ Testimony of Blixt, Bush and Kummer; Exs. 1-5.

²² Testimony of Bush and Kummer.

²³ Testimony of Bonham.

²⁴ Testimony of Kummer.

²⁵ Testimony of Bush and Kummer.

²⁶ Ex. 7.

²⁷ Testimony of Stone and Kummer.

the law permits. The Committee's decision not to bring a complaint against Ms. Kummer was due in part to the fact that there is no DFL-endorsed candidate in the Park Board District 5 race. In addition, the Committee did not want to have to file complaints against numerous other non-endorsed candidates who were using the initials "DFL" without any modifier. The letter sent by the Minneapolis DFL, while dated September 8, 2005, was not mailed to Ms. Kummer until October 4, 2005. The reason for the delay was due to changes made in the draft of the letter and difficulty in getting all Committee members' signatures.²⁸

25. Sometime on or after September 8, 2004, Ms. Kummer became aware that a letter on the use of the initials "DFL" by non-endorsed candidates was forthcoming from the Minneapolis DFL Executive Committee. Ms. Kummer decided not to change her literature or signs until she received the letter from the Minneapolis DFL.²⁹

26. Many other non-endorsed DFL candidates have put the initials "DFL" on their literature and lawn signs, including the mayoral candidates, R.T. Rybak and Peter McLaughlin.³⁰

27. It is common practice for endorsed candidates to advertise their party's endorsement on their campaign material via an explicit statement to the effect that they are "DFL Endorsed."³¹

28. On September 15, 2005, Mr. Stone filed a complaint with the Office of Administrative Hearings alleging that Ms. Kummer's campaign committee violated Minn. Stat. § 211B.02 by placing the initials "DFL" on her campaign literature and lawn signs.

29. On September 16, 2005, Administrative Law Judge Kathleen Sheehy determined that the complaint set forth a prima facie violation of Minn. Stat. § 211B.02.

30. After she received Judge Sheehy's prima facie determination, Ms. Kummer purchased a stamp and stickers bearing the word "MEMBER." The Kummer campaign has stamped Ms. Kummer's remaining campaign literature and placed the stickers on all of her lawn signs underneath the initials "DFL" so that the material now reads "DFL MEMBER." The Kummer campaign has not otherwise issued any corrective information to those who received the original distribution of 4,000 to 6,000 campaign flyers.³²

²⁸ Testimony of Bonham; Ex. 42.

²⁹ Testimony of Kummer.

³⁰ Exs. 30-35; Testimony of Kummer, Blixt and Bush.

³¹ Testimony of Bonham, Blixt; Exs. 43-52.

³² Testimony of Kummer; Exs. 40 and 41.

31. By Order dated September 23, 2005, Judge Sheehy found that there was probable cause to believe that the Respondent violated Minn. Stat. § 211B.02.

32. On October 4, 2005, Ms. Kummer was mailed the letter from the Minneapolis DFL that was addressed to all candidates for office. She actually had seen a copy of the letter on September 30, 2005.³³ The letter indicated that the Minneapolis DFL had been contacted by a campaign regarding an opponent's use of the initials "DFL" on campaign literature and signs. The Minneapolis DFL stated that Minnesota statutes and case law permitted only the DFL-endorsed candidate to use the party initials but that non-endorsed candidates could properly use the phrase "DFL member" or "DFL'er" on campaign material. The letter was dated September 8, 2005, and was signed by several Minneapolis DFL party officers.³⁴

Based upon the foregoing Findings of Fact, the panel makes the following:

CONCLUSIONS

1. Minn. Stat. § 211B.35 authorizes the panel of Administrative Law Judges to consider this matter.

2. Minn. Stat. § 211B.02 provides in relevant part that a person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate has the support or endorsement of a major political party or party unit or of an organization.

3. The burden of proving the allegations in the Complaint is on the Complainant. The standard of proof of a violation of Minn. Stat. § 211B.02 is a preponderance of the evidence.³⁵

4. The Complainant has shown by a preponderance of the evidence that the Respondent violated Minn. Stat. § 211B.02 by knowingly disseminating campaign material that used the initials "DFL" to imply falsely endorsement or support of the DFL party.

Based upon the record herein, and for the reasons stated in the following Memorandum, the panel makes the following:

³³ Testimony of Kummer.

³⁴ Ex. 42.

³⁵ Minn. Stat. § 211B.32, subd. 4.

ORDER

IT IS ORDERED: That the Supporters of Carol Kummer for Park Board Committee is assessed a civil penalty of \$600.

Dated this 13th day of October 2005.

/s/ Barbara L. Neilson
BARBARA L. NEILSON
Presiding Administrative Law Judge

/s/ Richard C. Luis
RICHARD C. LUIS
Administrative Law Judge

/s/ Bruce H. Johnson
BRUCE H. JOHNSON
Administrative Law Judge

MEMORANDUM

Ms. Kummer admits that she prepared and disseminated campaign literature and lawn signs in which the initials “DFL” appear near her name. Minn. Stat. § 211B.02 provides that a candidate may not knowingly make, directly or indirectly, a false claim stating or implying that the candidate has the support or endorsement of a major political party.

In *Schmitt v. McLaughlin*,³⁶ the Minnesota Supreme Court held that a candidate’s use of the initials “DFL” falsely implied that the candidate had the endorsement of the DFL party in violation of Minnesota election law.³⁷ The court explained that, while candidates have a right to inform voters of their party affiliation “by the use of such words as ‘member of’ or ‘affiliated with’ in conjunction with the initials ‘DFL,’” the use of the initials without such modifiers “would imply to the average voter that the contestee had the endorsement or, at

³⁶ 275 N.W.2d 587, 591 (Minn. 1979) (discussing Minn. Stat. § 210A.02, predecessor to Minn. Stat. § 211B.02).

³⁷ *Accord In the Matter of the Election of Ryan*, 303 N.W.2d 462 (Minn. 1981).

the very least, the support of the DFL party. To hold otherwise would render the word ‘imply’ meaningless.”³⁸

Ms. Kummer argues that she did not *knowingly* use the initials to falsely imply endorsement. She insists that it was never her intent to mislead anyone. In fact, she says she deliberately put the initials “DFL” in italicized print and separated them from the words “Labor Endorsed” in her campaign material in order to avoid the implication of endorsement.

In *Matter of Ryan*,³⁹ a non-endorsed candidate for County Commissioner distributed campaign literature with his party’s initials and the words “Labor Endorsed” in large letters with small lettering in between referring to a prior office held by the candidate. The candidate argued that he did not intend to violate the statute and that he made a conscious attempt to comply with the law. In determining whether the candidate’s false implication of party support was made knowingly, the Court declined to interpret “knowingly” to mean “deliberate.” Instead, the Court held that the candidate may be said to have “knowingly” violated the statute “if he knew that his literature falsely claimed or implied that he had party support or endorsement.”⁴⁰ The Court noted that the candidate was an experienced party regular who had run in a number of elections. By not using the precise modifying language authorized by the *Schmitt* court, the candidate consciously took the risk that his interpretation of the law was not correct. The *Ryan* court further warned candidates that after this opinion, those who seek elected office “should understand more clearly the limits of 210A.02 .”⁴¹

Like the candidate in *Ryan*, Ms. Kummer is, by her own admission, an experienced party regular who has been involved in a number of campaigns on behalf of other candidates as well as her own current campaign, and she is familiar with the governing campaign practice statutes. However, Ms. Kummer argues that this case can be distinguished from both *Schmitt* and *Ryan*. In *Schmitt*, the Court noted that “the advertising of endorsed candidates may have included the words “endorsed by” or may have simply included the name or initials of the party.”⁴² Given such campaign advertising by endorsed candidates, the Court found that the non-endorsed candidate’s use of the initials “DFL” would imply endorsement or support of the DFL party. Ms. Kummer maintains that the prevailing practice in Minneapolis during the current election is for endorsed candidates to use the words “Endorsed by” on their campaign material and for non-endorsed candidates to use simply the party name or initials. Ms. Kummer argues that the panel should consider this current prevailing practice of candidates in determining whether the Kummer campaign “knowingly” violated the statute. Ms. Kummer contends that, given this practice, the average voter would know that use of the party initials signifies only that the candidate is a member of that party.

³⁸ 275 N.W.2d at 591.

³⁹ 303 N.W.2d 462 (Minn. 1981).

⁴⁰ 303 N.W.2d at 467.

⁴¹ 303 N.W.2d at 468. (Minn. Stat. § 210A.02 is the predecessor to Minn. Stat. § 211B.02.)

⁴² 275 N.W.2d at 591.

The panel is not persuaded by Ms. Kummer's argument and will not interpret Minn. Stat. § 211B.02 as being dependent on a community's prevailing practice.⁴³ Instead the panel will follow the holdings in *Schmitt, Ryan and Matter of Daugherty v. Hilary*,⁴⁴ and conclude that by using the initials "DFL" on her campaign material without modifying language such as "Member," Ms. Kummer and the Supporters of Carol Kummer for Park Board Committee knowingly prepared and disseminated campaign material that falsely implied support or endorsement of the DFL party. The fact that other candidates during this election year may be violating Minn. Stat. § 211B.02 does not excuse the violation by the Kummer campaign.

The evidence established that Ms. Kummer and her campaign committee staff knew by August 20, 2005, that use of the initials "DFL" standing alone was a problem Ms. Kummer needed to address. Rather than do so, she waited until Administrative Law Judge Kathleen Sheehy issued a prima facie determination on Mr. Stone's complaint. It would have been prudent for Ms. Kummer and her campaign to give credence to the warnings and opinions they received from her opponent and Minneapolis DFL activists before conducting such a wide distribution of her campaign literature on August 20, 2005. She and her campaign co-chairs had notice that her campaign material may have implied falsely that she had party endorsement, yet they took the risk of a subsequent complaint and distributed the prepared material.⁴⁵

The Complainant did not have to put in evidence of the "average voter's" perception in order to establish a violation of Minn. Stat. § 211B.02. The case law establishes clearly that unqualified use of the initials "DFL," standing alone, in fact implies endorsement to the average voter.⁴⁶ In this case, such a claim is false, misleading, and violates Minn. Stat. § 211B.02.

Having found that the Respondent violated Minn. Stat. § 211B.02, the panel may make one of several dispositions.⁴⁷ The panel may issue a reprimand, may impose a civil penalty of up to \$5,000, and may refer the complaint to the appropriate county attorney for criminal prosecution. In this case, the panel has decided to impose a civil penalty of \$600. The panel concludes that Respondent's violation was knowing and not inadvertent. In addition, it can be concluded that the distribution of some 4,000 to 6,000 flyers

⁴³ In addressing Ms. Kummer's argument, the Panel considered the effect of interpreting the statute as allowing local prevailing political practice to be determinative of whether a violation of the statute occurred. That would result in the same practice constituting a violation of the law in some localities but not in others. Nothing in *Schmitt, Ryan* or *Daugherty* suggests that the Minnesota Supreme Court intended the statute to be interpreted in that way.

⁴⁴ 344 N.W.2d 826 (Minn. 1984).

⁴⁵ See Findings 16-20.

⁴⁶ Even if such evidence is required, Mr. Bonham's testimony would suffice to satisfy the requirement. Mr. Bonham testified that the use of "DFL" standing alone could create uncertainty for an uninformed voter, and it would be fair to say that some uninformed voters in an off-year election, such as this, possibly as many as one-third, might be confused and think "DFL" standing alone implied party endorsement.

⁴⁷ Minn. Stat. § 211B.35, subd. 2.

and more than 150 lawn signs had some impact on the voters. It is likely that Ms. Kummer has gained an advantage in the upcoming election by implying she has the support or endorsement of the DFL party. The panel concludes that a penalty of \$600 is appropriate.

B.L.N., R.C.L., B.H.J.